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PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Sylvia Steiner, Judge
Judge Anita Ušacka, Judge

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI***

Public Document

**Prosecution's Consolidated Response to the Defences' Motions Regarding the
Document Containing the Charges**

Source: The Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Background

1. On 9 June 2008, the Prosecution was notified of the urgent “Defence Motion seeking the Amendment of the Document containing the Charges” filed by the Defence for Germain Katanga (the “Katanga motion”).¹ On 10 June 2008, the Prosecution was notified of the “Requête de la Défense de Monsieur Mathieu Ngudjolo en vue de solliciter la suppression du paragraphe 92 du document relatif à la notification des charges en application de l’Article 61-3-a du Statut”² (the “first Ngudjolo motion”) and of the “Requête de la Défense de Monsieur Mathieu Ngudjolo en vue de faire sienne les points a (à l’exclusion des faits spécifiques à Mr Katanga), b, c, d et e contenus dans la « Defence Motion seeking the Amendment of the Document containing the Charges » déposé par l’équipe de Défense de Germain Katanga le 9 juin 2008”³ (the “second Ngudjolo motion”).

2. At the status conference held on 10 June 2008, the Single Judge indicated “In relation to the public motion of Mr. Germain Katanga, the Single Judge decides to give the Prosecution and the legal representatives of the victims of the case until Friday, the 13th of June, at 16 hours to file a response.” Additionally, the Single Judge also stated “In relation to the urgent -- original confidential motion by Mr. Mathieu Ngudjolo Chui that has already been reclassified as public, the Single Judge decides to give the Defence for Germain Katanga and the legal representatives of the victims of the case until Friday the 13th of June at 16 hours to file a response.”⁴

3. The following document constitutes the Prosecution’s consolidated response to the Katanga motion, and the first and second Ngudjolo motions.

¹ ICC-01/04-01/07-574.

² ICC-01/04-01/07-575.

³ ICC-01/04-01/07-576.

⁴ ICC-01/04-01/07-T-35-ENG, p.4, line 15-p. 5, line 3.

Overview of the Prosecution's position

4. All motions, for differing reasons, seek various amendments to the Prosecution's Document Containing the Charges. The Prosecution notes that these motions were lodged with the Chamber prior to the Prosecution having filed its amended charging document, and consequently were premised on and referenced to the Document Containing the Charges filed by the Prosecution on 21 April 2008.⁵ On 12 June 2008, the Prosecution filed the "Prosecution's Submission of Amended Document Containing the Charges and Additional List of Evidence"⁶. The Prosecution, in the instant document, addresses the complaints directed by the Defences on the basis that similar allegations would be directed at the Amended Document Containing the Charges (the "amended DCC").

5. The Prosecution submits that the criteria for the Document Containing the Charges in Regulation 52 of the *Regulations of the Court* are met by the amended DCC filed in this instant case. In this regard, Regulation 52 implements and gives expression to the right in Article 67(1)(a) to be informed "in detail of the nature, cause and content of the charge";⁷ a right which has been fully respected by the amended DCC. The Prosecution further recalls that this Pre-Trial Chamber has previously ruled "that the Document Containing the Charges transmitted by the Prosecution is to be read in conjunction with the Prosecution List of Evidence."⁸ It is submitted that in this instance, the amended DCC when read as a whole and in

⁵ ICC-01/04-01/07-422.

⁶ ICC-01/04-01/07-584 and annexes.

⁷ Contrary to the implication of the Defence of Katanga (Katanga motion, para. 5), the Prosecution is not seeking to deprive the Defences of any information which is required to satisfy their rights under Article 67(1)(a) and (b) by its references to Regulation 52. See also jurisprudence of the Appeals Chamber of the ICTY, according to which the applicable standard is whether "the accused has received timely, clear and consistent information from the Prosecution detailing the factual basis underpinning the charges against him or her" (*Prosecutor v. Naletilic et al.*, IT-98-34-A, Appeals Judgement, 3 May 2006 ("*Naletilic Appeals Judgement*"), para. 26).

⁸ *Prosecutor v. Lubanga*, ICC-01/04-01/06-803-tEN, 29 January 2007, para. 150. See also *Naletilic Appeals Judgement*, para. 27, according to which in some cases an accused may be put on notice of the charges against him or her also by way of information provided through the Prosecution pre-trial brief, its opening statements or a "list of witnesses the Prosecution intends to call at trial, containing a summary of the facts and the charges in the indictment as to which each witness will testify and including specific references to counts and relevant paragraphs in the indictment."

conjunction with the detailed List of Evidence (and the evidence set out in that List⁹) provides ample notice to the Defence of the nature of the crimes that must be defended against.

6. The majority of the Defence criticisms leveled at the amended DCC are of a piecemeal nature, alleging that particular paragraphs or phrases do not meet the criterion of sufficiency. This erroneous approach ignores the purpose of the Document Containing the Charges, namely that the Document as a whole puts the Defence on full notice with respect to the specific facts and allegations on which the Prosecution bases its case.

Alleged defects raised by the Defences

(a) The Document provides insufficient factual details describing Katanga's/Ngudjolo's participation in the common plan

7. The Defences' first challenge is to the factual details relating to the participation of the suspects in the common plan.¹⁰ They make extensive reference to jurisprudence from the *ad hoc* international criminal tribunals regarding the modes of liability of joint criminal enterprise ("JCE") and common purpose, which have been held to be the same under the statutes of those tribunals.¹¹ In so doing, the Prosecution submits that they have failed to consider the difference between the modes of liability provided in the ICC Statute, as compared with the statutes of the *ad hoc* international criminal tribunals. In particular, under the ICC Statute, not every member of a common plan will be a co-perpetrator. Rather, only those whose role and contribution give them control over the commission of the crime will be liable as co-perpetrators.¹² Other individuals who shared the common plan and contributed towards it in different ways may be liable under other modes of liability.

⁹ This is a question of the Prosecution providing ahead of time further details of the allegations by specifically linking each to the items of evidence which support them and not, as alleged by the Defence (e.g. Katanga's motion, para. 19), seeking to omit material aspects in order to mould its case as the evidence emerges.

¹⁰ Katanga motion, paras. 11-21.

¹¹ See Katanga motion, para. 14.

¹² As the Prosecution has previously submitted, "the accused must have exercised functional control over the implementation of the common plan by reason of the central task or role assigned to him, and provided a

8. In relation to the core arguments of the Defence, that the details of the suspects' participation in the common plan have not been sufficiently pleaded,¹³ the explanation of the common plan and both Katanga's and Ngudjolo's participation begins at paragraph 63 of the amended DCC. Explicit reference to both suspects' parts in the coordination and organization of the plan to attack Bogoro are contained in paragraphs 65, 66, 67, 68, and 69. A detailed description of Katanga's direct involvement and movements prior to the attack are outlined in paragraphs 71 through to 73 as is Ngudjolo's involvement in paragraphs 74 through to 76. Katanga's and Ngudjolo's individual involvement in the execution of and following the attack is explicitly spelled out in paragraphs 78, 85 and 87. Additionally, detailed references to support all of these factual representations are supplied in the List of Evidence. The facts pleaded in these paragraphs, when read together and especially when read in conjunction with the supporting evidentiary basis and material which are specifically and explicitly linked to each allegation,¹⁴ provide the Defences with sufficient detailed notice of the charges against both suspects and amply meet the pleading requirement prescribed in Regulation 52.¹⁵

substantial contribution to the implementation of the common plan. Functional control exists, not only where the accused has actually made an essential contribution to the commission of the crime, but also where (i) the role assigned to the accused *ex ante* was central to the implementation of the plan, and (ii) it appears in retrospect that his contribution was substantial, though not essential." (*Prosecutor v Lubanga*, ICC-01/04-01/06-1363, 30 May 2008, para. 33, internal references omitted). In relation to the implications for pleading, see further paras. 11-12 and footnote 20, below; contrast with Katanga motion, para. 15.

¹³ Katanga motion, paras. 14, 16-20.

¹⁴ See para. 5 and footnote 9 above.

¹⁵ In relation to the submissions in Katanga's motion, para. 21, the facts pleaded in the amended DCC go to both of the specified modes of liability, and represent two alternative legal characterisations of the same facts. The Prosecution recalls that it initially sought warrants of arrest against the two suspects based on liability for ordering the crimes under Article 25(3)(b). The Pre-Trial Chamber subsequently found that based on the same facts there were also reasonable grounds to believe that the suspects may be responsible based on the theory of co-perpetration under Article 25(3)(a) (see ICC-01/04-01/07-55, 5 November 2007, paras. 55, 58-60; ICC-01/04-01/07-262, 11 March 2008, paras. 55, 58-61), explicitly considering the giving of orders as a contribution in the context of co-perpetration (see ICC-01/04-01/07-55, 5 November 2007, paras. 59; ICC-01/04-01/07-262, 11 March 2008, para. 60). The arrest warrants were thus issued for these two modes of liability in the alternative, and the Prosecution has pleaded both modes of liability to provide the Defences with full and early notice. In this regard, the decision of the ICTY in *Prosecutor v Brdjanin* referred to by the Defence (Katanga motion, footnote 17) is not relevant – the Prosecution in this case has not attempted to incorporate all forms of liability by reference, but has sought to avoid just this kind of ambiguity by specifically identifying and pleading the two relevant modes of liability.

(b) Omission of names and specific acts of Katanga's and Ngudjolo's alleged co-perpetrators

9. It is submitted that both Defence teams are provided with clear notice as to the identities and contributions of the other members of the common plan, including the two suspects themselves.¹⁶ The other members of the common plan are identified and their contributions are explained in paragraphs 42, 44, 63, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77 and 78 of the amended DCC. All of the facts contained in these paragraphs are further fully sourced with detailed evidence in the List of Evidence.

10. In addition, the Defence submission that the references to "other" FNI and FRPI commanders in paragraphs 63 and 95 are "too vague" for the purposes of identifying other members of the common plan attempts to view individual paragraphs in isolation,¹⁷ and fails to recognize the manner in which the relevant documents, when read as a whole, provide the necessary information in a clear, precise and consistent form. It is submitted that this criticism by the Defence is thus without merit.

11. As explained above, not every member of the common plan will necessarily have an essential role in the implementation of the common plan, and thus exercise functional control over the implementation of the common plan by reason of the central task or role assigned to him or her. In the instant case, the Prosecution pleads that Katanga and Ngudjolo agreed to the common plan together with other commanders of the FNI and the FPRI;¹⁸ however only Katanga and Ngudjolo are alleged to have had an essential role in the implementation of the common plan and

¹⁶ The Defence appears to use "member of the common plan" and "co-perpetrator" interchangeably (contrast paras. 22 and 23 of Katanga's motion).

¹⁷ For example, while para. 63 of the amended DCC does refer to "KATANGA, NGUDJOLO and other FRPI and FNI commanders", many of those other commanders are explicitly identified just two paragraphs later in para. 65 of the amended DCC.

¹⁸ Amended DCC, para. 93.

to have provided the necessary contribution,¹⁹ and are thus alleged to be co-perpetrators pursuant to Article 25(3)(a).

12. The question is whether the relevant participants have been sufficiently identified to put the Defence on notice of the case which they have to answer²⁰ – there is no requirement or obligation to individually identify each member.²¹ The Prosecution has specifically identified the alleged co-perpetrators; has detailed the acts which constitute their contribution; and has also identified as far as is possible the other members of the common plan. As a result, it has complied with the requirements to provide the Defences with adequate notice.

13. Finally, in regard to the complaint that the amended DCC “does not specify which offences were physically perpetrated by which militia”, the Prosecution notes that this case is based on co-perpetration in relation to a coordinated attack by both militias. The manner of this coordination and the identity of the militia responsible for the crimes are pleaded with sufficient specificity to put the Defence on notice.²²

(c) Failure to specify the identity of the victims

14. It is submitted that the Prosecution is not legally obliged to plead the specific identity of victims in the Document Containing the Charges. Indeed, in order to prove the specific offences in question, as a matter of law the Prosecution is not required to establish the identity of any specific victim if the “sheer scale of the

¹⁹ Amended DCC, paras. 94-97.

²⁰ The applicable standard regarding the sufficiency of particularity of pleading its allegations as defined by the Appeals Chamber of the ICTY is whether the Prosecution in its indictment sets out the material facts of the case with enough detail to inform an accused clearly of the nature and cause of the charges against him or her so that the accused may prepare a defence effectively and efficiently (see *Prosecutor v. Kupreskic et al.*, IT-95-16-A, Appeal Judgement, 23 October 2001, para. 88. See also *Prosecutor v. Naletilic et al.*, IT-98034-A, Appeals Judgement, 3 May 2006, para. 23).

²¹ Furthermore, the Prosecution notes that even based on the line of jurisprudence relied upon by the Defence, there is still no broad requirement that the Prosecution must plead the identity of every member of the common plan. According to the jurisprudence of the UN *ad hoc* Tribunals on JCE, not every member of the JCE must be identified by name (see for instance *Prosecutor v. Brdjanin*, IT-99-36-A, Appeal Judgement, 3 April 2007, para. 430). The Prosecution thus submits that the detail provided in the amended DCC would, in any event, be sufficient.

²² See e.g. amended DCC, paras. 71, 73 and 78.

alleged crimes makes it impracticable to require a high degree of specificity in such matters”.²³

15. While the Defence asserts that the information on the identities of the victims is useful for its preparation, the Prosecution respectfully observes that the List of Evidence, and in particular the evidence which is specifically sourced to paragraph 87 and the allegation that at least 200 civilians died in the Bogoro attack indeed provide the Defence with much of the information that they claim is valuable for the preparation of the Defence case.²⁴

(d) Vague phrases

16. It is submitted that the term “wipe out” complained of by the Defence is not vague and is indeed completely comprehensible when read in the context of the paragraph in question and more importantly when the amended DCC is read as a whole.²⁵ The phrase is located first in paragraph 63 in the following context:

As described below, during the Aveba meetings, which took place in late 2002 - early 2003 a common plan to carry out a joint attack to “**wipe out**” the village of Bogoro was agreed upon by KATANGA, NGUDJOLO and other FNI and FRPI commanders. Such plan consisted in attacking indiscriminately both civilians not taking part in hostilities and UPC soldiers, instead of merely targeting the UPC camp inside Bogoro.[emphasis added]

²³ See *Naletilic Appeals Judgement*, para. 24; see also *Prosecutor v. Kupreskic et al.*, IT-95-16-A, Appeal Judgement, 23 October 2001, para. 89. See further *Prosecutor v. Ntakirutimana*, ICTR-96-10; 2: ICTR-96-17, Appeal Judgement, 13 December 2004, in which the Appeals Chamber pointed out that “the inability to identify victims is reconcilable with the right of the accused to know the material facts of the charges against him because, in such circumstances, the accused’s ability to prepare an effective defence to the charges does not depend on knowing the identity of every single alleged victim. The Appeals Chamber recalls that the situation is different, however, when the Prosecution seeks to prove that the accused personally killed or harmed a particular individual. [...] [T]he Prosecution cannot simultaneously argue that the accused killed a named individual yet claim that the ‘sheer scale’ of the crime made it impossible to identify that individual in the indictment. Quite the contrary: the Prosecution’s obligation to provide particulars in the indictment is at its highest when it seeks to prove that the accused killed or harmed a specific individual” (paras 73-74).

²⁴ To the extent that it is in the possession of the Prosecution – see e.g. Additional List of Evidence, ICC-01/04-01/07-584-Conf-Anx1B, page 107, including *inter alia* DRC-OTP-1007-0029. While the Prosecution has thus provided the Defences in this case with extensive information regarding the victims of the attack, to the extent possible, it also notes that the Rules of Procedure and Evidence (see e.g. Rule 81(4)) and the jurisprudence of the Appeals Chamber (see e.g. ICC-01/04-01/07-521 OA5, 27 May 2008) expressly provide for the identities of victims and witnesses to be withheld from the Defence at the stage of the confirmation hearing.

²⁵ The Prosecution submits that the term “wiping out” is frequently used by Chambers of the UN *ad hoc* Tribunals in making findings of fact in the context of mass atrocities. See for instance *Prosecutor v. Krajisnik*, IT-00-39-T, Judgment, 27 September 2006, paras. 651 and 838; *Prosecutor v. Rwamakuba*, ICTR-98-44-AR72.4, Decision of 22 October 2004, para. 25; *Prosecutor v. Galic*, IT-98-29-T, Judgment, 5 December 2003, para. 593; *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, Judgment, 22 February 2001, para. 577.

It is employed again later in paragraph 66, in the following passage, along with the similar descriptive phrase of “to erase”:

From the outset of the planning of the attack, the objective of KATANGA and NGUDJOLO, as well as the other commanders, was “to erase” or “wipe out” the village of Bogoro and open the road to Bunia.[emphasis added]

17. The Prosecution also notes that the List of Evidence details the specific evidence in which the phrase in question is used, which further places the phrase in context and facilitates its comprehension.²⁶

18. It is also submitted that the Defences’ criticism that the term “at least” employed in paragraph 95 of the amended DCC²⁷ is similarly misplaced. The impugned expression employed in this paragraph is simply a reiteration and summary of the allegations of facts of contribution by Katanga and Ngudjolo, made for the purpose of explaining the modes of liability as alleged by the Prosecution. The use of the term is not vague when read in the context of the charging document as a whole and is not prejudicial to the Defence since the underlying facts are specifically pleaded (in paragraphs 42, 63, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77 and 78 of the amended DCC as discussed above) and are further sourced to the List of Evidence.

(e) Alleged defects in charge of child soldiers

19. The Prosecution has specifically alleged in count 5 of the amended DCC that both Katanga and Ngudjolo contravened Articles 8(2)(e)(vii) or 8(2)(b)(xxvi) of the Rome Statute by using children under the age of 15 to participate in active hostilities *during the attack on Bogoro*. The specific factual allegations against Katanga and Ngudjolo relating to this charge are clearly set out in paragraphs 50, 51, 52, 61, 62, 78 and 88 of the amended DCC. When these paragraphs are examined, along with a reference to the corresponding detailed List of Evidence, it is submitted that the

²⁶ Additional List of Evidence, ICC-01/04-01/07-584-Conf-Anx1B, p. 90.

²⁷ Katanga motion, para. 28.

Defences' suggestion that "[m]ore details of this crime must be provided"²⁸ is misplaced.

(f) Admissions allegedly made by Katanga and Ngudjolo

20. The Defence of Katanga levels several differing criticisms against the alleged admission made by Katanga at paragraphs 90 and 91 of the amended DCC. First, the Defence takes issue with the inclusion, in the description of the inculpatory statement by Katanga, of the reference to Katanga's admitted responsibility for the attack on Mandro.²⁹ Second, the Defence complains about the inclusion of an alleged statement from Commander DARK made one month after the Bogoro attack relating to the command role of Katanga.³⁰ Third, the Defence appears to allege that it is improper for this Chamber to receive evidence of "after-the-fact" admissions, purportedly on the basis that such statements do not add "anything with regards to the material facts in terms of providing a fuller picture of the circumstances in which the offences took place".³¹ Finally, the Defences for both Katanga and Ngudjolo submit that the pleading of a post-offence statement made by the suspect violates the presumption of innocence and right to silence.³²

21. The Prosecution submits that the inclusion of the reference to the attack in Mandro, which is an integral part of the statement referred to, does not constitute any defect in the amended DCC. It is the Prosecution's intention to rely on the alleged statement for its incriminatory value; and the reference to the proximate attack on Mandro provides context to assist in specifying that the attack on Bogoro referred to is the one which is the subject of this case. In this regard, it is incumbent on the Prosecution to plead the essentials of the alleged statement, and not to modify or tailor its contents to suit the specific needs of the Prosecution in the case. The Prosecution refers in the amended DCC to this statement and to other evidence in

²⁸ Katanga motion, para. 29.

²⁹ Katanga motion, paras. 31-32.

³⁰ Katanga motion, para. 33.

³¹ Katanga motion, para. 36.

³² Katanga motion, para. 37; first Ngudjolo motion, paras. 12, 20, and 34-44.

order to clarify material facts pleaded in the amended DCC. Reference to key evidence for those purposes cannot be impermissible, as it assists in putting the Katanga and Ngudjolo Defences on notice of the particulars of the charges brought against them. Furthermore, the Prosecution submits that the Chamber can easily and quite properly direct itself as to the permissible and impermissible uses of this statement.

22. In relation to the Defence's concerns regarding the introduction of "highly prejudicial 'similar fact'/pattern of conduct evidence through the back door",³³ without discussing the admissibility of such evidence before this Court or for the purposes of the confirmation hearing, the Prosecution also notes that it is not presenting any specific facts relating to the Mandro attack. The inclusion of the reference to Mandro in these pleadings is not intended to establish a consistent pattern of conduct, but rather to accurately reflect the underlying evidence.³⁴ The line of reasons on which the Defence's fears regarding the "similar fact/pattern of conduct" evidence, and the associated concerns of prejudice in this regard, are thus misplaced.

23. On the issue of the alleged statement made by Commander DARK,³⁵ an alleged member in the common plan regarding the Bogoro attack, the Defences themselves recognise that nothing "oblige[s] the Prosecution to delete all evidence from the Document Containing the Charges."³⁶ The fact that this material fact, relevant to the control and orders of one of the suspects, is presented in the narrative part of the DCC in connection with a key element of evidence underpinning it, in order to make clear the relationship between the evidence and the fact and provide additional notice to the suspects, does not place this beyond the bounds of the amended DCC. The Prosecution submits that the Defence position in this regard is,

³³ Katanga motion, paras. 38-39.

³⁴ The Prosecution therefore deems it unnecessary to make any submissions regarding the treatment before this Court of evidence of consistent pattern of conduct.

³⁵ Katanga motion, paras. 33-35.

³⁶ Katanga motion, para. 33.

in reality, a collateral challenge to the admissibility of the statement and not properly a complaint about the pleading of the statement in the amended DCC.³⁷ As such, it should not be considered by the Chamber at this stage. It is the Prosecution's submission that the facts in Commander DARK's statement, regarding the authority of Katanga over him in Bogoro, are relevant to the latter's after-the-fact control over Bogoro, and as a result the statement is properly pleaded within the amended DCC.

24. Finally, both Defence teams challenge the inclusion of statements made by each suspect after the attack on Bogoro.³⁸ The Prosecution submits that, in general, post-offence statements made by an alleged perpetrator of crimes may be highly relevant to the intent and state of mind of the person prior to and at the time of the commission of the offences. If accepted by the Chamber, the alleged statements made by Katanga and Ngudjolo are further facts from which the Chamber could infer that the suspects had ordered and coordinated the attack on Bogoro, and therefore relevant to the issues of *mens rea* and mode of liability. It is submitted that the Prosecution has quite properly pleaded these statements as part of the "factual basis" to bring the persons to trial, as required under Regulation 52.

25. In this regard, it is also submitted that both Defence teams' claims that the pleading of these statements violates their right to silence fundamentally misapprehends the nature and purpose of the Document Containing the Charges. The pleadings set forth in the amended DCC are the statement of the case which the Prosecution levels against the suspects. They do not constitute proof of these statements. It is entirely appropriate for the Prosecution to plead the fact that the suspects made these statements in the charging document, to provide notice to the suspects of the nature of and the case against them. The evidence which the Prosecution will bring to support these allegations is a separate issue. As the

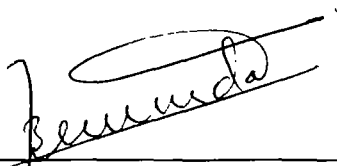
³⁷ In this regard, the Prosecution would submit that the statement of DARK regarding the authority of Katanga over him in Bogoro is highly probative of the latter's after-the-fact control over Bogoro and is *prima facie* admissible for that purpose.

³⁸ Katanga motion, para. 33; first Ngudjolo motion, paras. 5, 7, 15, 20, 26, 29, 37, 38 and 42.

references to the admissions in the amended DCC amount solely to the Prosecution's allegations against the suspects, there is no violation of any right to silence.

Order requested

The Prosecution submits that the Katanga motion, the first and second Ngudjolo motions be dismissed.



Fatou Bensouda, Deputy Prosecutor
on behalf of
Luis Moreno-Ocampo, Prosecutor

Dated this 13th day of June 2008

At The Hague, Netherlands